(4)

Supreme Court, U.S.
FILED
APR 4 2003
CLERK

No. 02-1295

In the
SUPREME COURT OF THE UNITED STATES

THE CITIZENS BANK,

Petitioner,

vs.

ALAFABCO, INC., DONNIE COTTINGHAM, JOANN BECK, AND WESTON BECK,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR ALABAMA PEST CONTROL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

ALGERT S. AGRICOLA, JR.
G.R. TRAWICK *
JASON J. BAIRD
SLATEN & O'CONNOR, P.C.
Winter Loeb Building
105 Tallapoosa St., Ste. 101
Montgomery, AL 36104
(334) 396-8882

*Counsel of record

April 4, 2003

55 pp

QUESTIONS PRESENTED

I. The Petition presents an important question of federal law which should be resolved by this Court; namely, should the effects of interstate commerce be aggregated in considering whether the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, is applicable to an arbitration clause in a commercial contract between two intrastate actors?

II. Should this Court exercise its discretion to correct a misinterpretation by the Alabama Supreme Court of federal law, which is in conflict with every other state and federal circuit that has addressed the issue?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

REASONS FOR GRANTING THE PETITION 5

I. The effects of interstate commerce should be aggregated in considering whether the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, is applicable to an arbitration clause in a commercial contract between two intrastate actors. 5

A. *Wickard/Lopez* Require Aggregation in Cases Involving Economic Activities. 5

B. Alabama's Supreme Court Has Repeatedly Refused To Enforce Arbitration Agreements. 7

C. *Allied-Bruce Terminix* Mandates that Pest Control Arbitration Agreements be Enforced. 13

D. *Alafabco* and its Progeny Continue the Alabama Supreme Court's Intransigence. 14

II. This Court should exercise its discretion to correct a misinterpretation by the Alabama Supreme Court of federal law, which is in conflict with every other state and federal circuit that has addressed the issue. 17

CONCLUSION 19

INDEX TO APPENDICES

APPENDIX A – Opinion of the Alabama Supreme Court in *Bowen v. Security Pest Control, Inc.*, No. 1010783, 2003 Ala. Lexis 64 (Ala. Feb. 28, 2003) 1a

TABLE OF AUTHORITIES

Page

Cases cited:

Alafabco, Inc. v. Citizens Bank,
No. 1010703, 2002 Ala. Lexis 249
(Ala. Aug. 30, 2002). 2, 12-14

Allied-Bruce Terminix Companies, Inc. v. Dobson,
513 U.S. 265 (1995) 8, 9, 12-16, 19

Bowen v. Security Pest Control, Inc.,
No. 1010783, 2003 Ala. Lexis 64
(Ala. Feb. 28, 2003) 14-17

Brown v. Investors Mortgage Co.,
121 F.3d 472 (9th Cir. 1997) 18

Dailey v. Veneman,
2002 U.S. App. Lexis 24623
(6th Cir. 2002) 18

Durr v. Booker,
1997 U.S. App. Lexis 435
(10th Cir. 1997) 18

Ex parte Alabama Oxygen Co.,
433 So.2d 1158 (Ala. 1983) 7, 8

Ex parte Alabama Oxygen Co.,
452 So.2d 860 (Ala. 1984) 8

Ex parte Costa & Head (Atrium), Ltd.,
486 So.2d 1272 (Ala. 1986) 8

Ex parte Warren,
548 So.2d 157 (Ala. 1989) 8

Freedom Baptist Church of Delaware County v. Township of Middleton,
204 F.Supp.2d 587 (E.D.Pa. 2002) 18

Frier v. Westinghouse Electric Corp.,
303 F.3d 176 (2d Cir. 2002) 18

G.D.F. Realty Investments, Inc. v. Norton,
2003 U.S. App. Lexis 5818 (5th Cir. 2003)
. 18

Gibbs v. Babbitt,
214 F.3d 483 (4th Cir. 2000) 18

Haeberlin Farms, Inc. v. I.G.F. Insurance Co.,
641 N.W.2d 816 (Iowa 2002) 18

Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S.264 (1981). 7

Hurst v. Tony Moore Imports, Inc.,
699 So.2d 1249 (Ala. 1997) 9

National Association of Homebuilders v. Babbitt,
130 F.3d 1041 (D.C. App. 1997) 18

Perry v. Thomas,
482 U.S. 483 (1987) 5

Sisters of the Visitation v. Cochrane Plastering Co., Inc., 775 So.2d 759 (Ala. 2000) . . . . *passim*

United Property Owners Association v. Borough of Belmar, 777 A.2d 950 (N.J. Sup. 2001) 18

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, 529 U.S. 598 (2000) 6, 7, 11, 12

University of South Alabama Foundation v. Walley, 2001 U.S. Dist. Lexis 2975 (S.D. Ala. 2001) 18

Wickard v. Filburn, 317 U.S. 111 (1942] ..... *passim*

York International, et al. v. Alabama Oxygen Co., Inc., 465 U.S. 1016 (1984) 7

Statutes cited:

Ala. Code 1975, § 8-1-41(3) 7

18 U.S.C. §922(q) 10

9 U.S.C. §1 5

In the
SUPREME COURT OF THE UNITED STATES

THE CITIZENS BANK,

Petitioner,

vs.

ALAFABCO, INC., DONNIE COTTINGHAM, JOANN BECK, AND WESTON BECK,

Respondents.

BRIEF FOR ALABAMA PEST CONTROL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus curiae Alabama Pest Control Association[1] respectfully requests a Writ of Certiorari be issued to review the opinion of the Alabama Supreme Court in this case.

INTEREST OF THE AMICUS CURIAE

The Alabama Pest Control Association is a nonprofit, voluntary-membership, trade association

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Alabama Pest Control Association states that this brief was prepared in its entirety by amicus curiae and its counsel. No monetary contribution toward the preparation or submission of the brief was made by any person other than amicus curiae, its members, and its counsel.

organized to promote the interest of the pest control operators in the State of Alabama. Its membership includes not only pest control operators, but also suppliers, manufacturers, and consultants. Many members of the Alabama Pest Control Association are pest control firms doing business in two or more states. Each year Alabama pest control operators purchase millions of dollars of equipment, supplies and services from out of state manufacturers and providers. These supplies are transported across state lines and distributed within the State of Alabama as part of interstate commerce. Many of the pest control operators' termite contracts contain arbitration agreements. These arbitration agreements are effectively rendered unenforceable by the Alabama Supreme Court's decision in *Alafabco, Inc. v. Citizens Bank*, No. 1010703, 2002 Ala. Lexis 249 (Ala. Aug. 30, 2002).

This brief in support of Citizens Bank's petition for writ of certiorari is submitted to emphasize to this Court that the standard set by Alabama state courts for enforcing arbitration provisions effectively limits the plenary power of Congress, contradicts the federal policy favoring arbitration, defeats the primary purpose of the Federal Arbitration Act ("FAA") and denies members of the Alabama Pest Control Association their contracted-for right to arbitration.

Pursuant to Supreme Court Rule 37, both petitioner Citizens Bank and respondent Alafabco, Inc.

granted the Alabama Pest Control Association leave to file an amicus curiae brief supporting Citizens Bank's petition for writ of certiorari. A copy of the letters granting leave to file an amicus curiae brief is submitted contemporaneously with this amicus curiae brief.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for certiorari to resolve a compelling federal question: Whether the Alabama Supreme Court can unilaterally refuse to apply the aggregation principle found in *Wickard v. Filburn*, 317 U.S. 111 (1942) and *Wickard*'s progeny in determining the applicability of the FAA to a commercial intrastate contract. This Court should further grant the writ to resolve a split among the states and between Alabama and the federal circuits with respect to this same issue.

In *Wickard*, this Court held that even local activities not generally regarded as commerce could be reached by Congress power to regulate commerce if the activity exerted a substantial economic effect on interstate commerce. This Court further emphasized that while that party's own contribution to the demand for wheat may be trivial by itself, that was "not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from

trivial." *Wickard*, 317 U.S. at 127-28 (internal cites omitted).

In *Sisters of the Visitation v. Cochrane Plastering Co., Inc.*, 775 So.2d 759 (Ala. 2000), the Alabama Supreme Court held that in order to trigger the FAA, the contract must substantially affect interstate commerce. *Id.* at 763. Since that decision, the Alabama Supreme Court has released an ever-growing body of decisions implicitly rejecting the aggregation principle and has held that in order to enforce an arbitration agreement in an intrastate contract, the party seeking to invoke arbitration must demonstrate that the contract involves a substantial effect upon interstate commerce. Further, the Alabama Supreme Court has refused to use the aggregation principle of *Wickard* and its progeny in determining whether a commercial activity has a substantial effect on interstate commerce.

REASONS FOR GRANTING THE PETITION

I. The effects of interstate commerce should be aggregated in considering whether the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, is applicable to an arbitration clause in a commercial contract between two intrastate actors.

A. *Wickard/Lopez* Require Aggregation in Cases Involving Economic Activities.

The Alabama Supreme Court has misapplied this Court's holding in *United States v. Lopez*, 514 U.S. 549 (1995) to deny the rights of thousands of Alabama's citizens to proceed to contracted-for arbitration.

Congress' authority under the FAA is expansive, and coincides with that granted under the Commerce Clause. *Perry v. Thomas*, 482 U.S. 483, 490 (1987). In *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court held that under the Commerce Clause, Congress had the power to limit the production of wheat by a farmer whose crop size was minimal. This Court held that in determining the effects of an activity on interstate commerce, courts are to consider the aggregate effect of that type of activity on interstate commerce. *Id.* at 124-28. This Court further rejected the direct/indirect effects analysis of earlier decisions:

> Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Wickard, 317 U.S. at 125.

This Court's *Wickard* aggregation principle was reaffirmed in *United States v. Lopez*, *supra*, where this Court stated that for a federal statute which regulates commercial transactions to be a valid exercise of Congress' commerce power, the aggregate nationwide participation in that activity must substantially affect interstate commerce. *Lopez*, 514 U.S. at 556. Indeed, *Lopez* specifically requires that activities which arise out of or are connected with a commercial transaction are to be viewed in the aggregate to determine whether they substantially affect interstate commerce. *Id.* at 561.

In the more recent case of *United States v. Morrison*, 529 U.S. 598 (2000), this Court reaffirmed that *Wickard*'s aggregation principle applies in cases involving economic activity. *Morrison*, 529 U.S. at 611, n.4. This is in keeping with this Court's longstanding principle that even activity which is purely intrastate in character may be regulated by Congress where the

activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S.264 (1981).

This Court has therefore made it exceedingly clear that in Commerce Clause analysis of cases involving intrastate economic activity, the commercial activity is to be examined under the aggregation principle. *Morrison*, 529 U.S. at 611; *Lopez*, 514 U.S. at 561; *Hodel*, 452 U.S. at 277; *Wickard*, 317U.S. at 124-28.

B. Alabama's Supreme Court Has Repeatedly Refused To Enforce Arbitration Agreements.

In order to view this certiorari petition with the proper perspective, it is necessary to provide a brief background of the historical hostility of the Alabama Supreme Court towards arbitration. Alabama statutory law prohibits enforcement of an agreement to submit a controversy to arbitration. Ala. Code 1975, § 8-1-41(3). In *Ex parte Alabama Oxygen Co.*, 433 So.2d 1158 (Ala. 1983), the Alabama Supreme Court held that the FAA was not applicable in state courts. After this Court vacated the Alabama Supreme Court's judgment and remanded the case, *York International, et al. v. Alabama Oxygen Co., Inc.*, 465 U.S. 1016 (1984), the Alabama Supreme Court only grudgingly acknowledged that the FAA applied to cases brought in

courts in the State of Alabama. See *Ex parte Alabama Oxygen Co.*, 452 So.2d 860, 861 (Ala. 1984).

Following the *Ex parte Alabama Oxygen* opinions, the Alabama Supreme Court adopted the "slightest-nexus" test for arbitration, holding that the FAA applied in cases where the agreement had the slightest nexus with interstate commerce. *Ex parte Costa & Head (Atrium), Ltd.*, 486 So.2d 1272 (Ala. 1986). However, the Alabama Supreme Court abruptly rejected the "slightest-nexus" test in *Ex parte Warren*, 548 So.2d 157 (Ala. 1989). In *Warren*, the Alabama Supreme Court adopted the "contemplated substantial interstate activity" standard for determining whether the FAA applied in Alabama state courts; that is, whether the parties subjectively contemplated, at the time of contracting, that the subject of the contract would involve substantial interstate commerce. *Id.* at 159-60.

This Court specifically rejected this standard in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), holding "[w]e find the interpretive choice difficult, but for several reasons we conclude that the first interpretation ('commerce in fact') is more faithful to the statute than the second ('contemplation of the parties')." *Id.* at 278. This Court further stated, "The parties do not contest that the transaction in this case, in fact, involved interstate commerce. In addition to the multistate nature of Terminix and

Allied-Bruce, the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the plan, came from outside Alabama." 513 U.S. at 282.

Following this Court's *Allied-Bruce Terminix* decision, the Alabama Supreme Court initially interpreted that case to hold that even an intrastate transaction involves interstate commerce if it has virtually any tangible effect on the generation of goods or services for interstate markets and their distribution to the customer. *Hurst v. Tony Moore Imports, Inc.*, 699 So.2d 1249, 1257 (Ala. 1997). Interestingly, *Hurst* also stated, "However, we do not view *Lopez* as signaling a retreat by the Supreme Court from its expansive interpretation of 'interstate commerce' in cases clearly involving commercial transactions." *Id.* at 1257.[2] However, this interpretation did not last.

In *Sisters of the Visitation v. Cochrane Plastering Co., Inc.*, 775 So.2d 759 (Ala. 2000), the Alabama Supreme Court revised its opinion of the FAA's scope again. The Alabama Supreme Court held that in order to trigger the FAA, the contract must "substantially affect" interstate commerce. *Id.* at 763. The Alabama Supreme Court based this revision upon language it erroneously interpreted as dicta in *United States v.*

---

[2] The Alabama Supreme Court has not yet explained why its interpretation of *Lopez* changed so markedly from 1997 to 2000.

Lopez, *supra*. The *Sisters of the Visitation* Court established a five-part test for determining whether a contract "substantially affects" interstate commerce to such a degree as to trigger the FAA: (1) the citizenship of the parties; (2) the origin of any tools and equipment; (3) the allocation of cost of services and materials; (4) the subsequent movement across state lines of the object of the services; and (5) the degree of separability from other contracts. *Sisters of the Visitation*, 775 So.2d at 765-67.

The Alabama Supreme Court mischaracterized the language in *Lopez* as dictum to justify imposing the more stringent "substantially affects" test, without the *Wickard/Lopez* aggregation principle, for employing the FAA:

> The Lopez Court referred to the requirement of a substantial effect as generally applicable to regulation of economic activity. *Id.* at 560, 115 S.Ct. 1624. That broad reference, albeit dictum, does not suggest that the requirement of substantial effect would not apply to the question whether a particular contract is subject to the FAA.

Sisters of the Visitation, 775 So.2d at 761.

Lopez was a case involving 18 U.S.C. §922(q), the Gun-Free School Zones Act of 1990, and was not a true "commerce" case, a fact not lost upon the *Lopez*

Court. *Lopez*, 514 U.S. at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise"). As this Court noted in *United States v. Morrison*, 529 U.S. at 609, several significant considerations led to this Court's decision in *Lopez*. First, and most important, the *Morrison* Court noted that *Lopez* involved analysis of a criminal statute that by its terms had nothing to do with commerce or any sort of economic enterprise. *Morrison*, 529 U.S. at 610. As *Morrison* explained:

> Both petitioners and Justice Souter's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case ... *Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

Morrison, 529 U.S. at 610-11. More importantly, the Alabama Supreme Court simply ignored the inconvenient fact that *Lopez* reaffirmed that *Wickard*'s aggregation principle applies in cases involving

economic activity. *Lopez*, 514 U.S. at 561. See also *Morrison*, 529 U.S. at 611, n.4.

Lopez was released approximately three months after *Allied-Bruce Terminix*, and by its language did not modify the holding in that case; however, in *Sisters of Visitation*, released almost five years after *Lopez*, the Alabama Supreme Court discerned a heretofore-undiscovered requirement in *Lopez* that it must now employ the "substantial effect" test in arbitration cases. Since, the *Sisters of the Visitation* test looks at each commercial transaction in isolation, it does not employ the aggregation principle as plainly required by *Wickard* and its progeny.

Thus, in *Sisters of the Visitation*, the Alabama Supreme Court attempted to evade the United States Supreme Court's holding in *Wickard* so as to exclude local or indirect effects on interstate commerce unless the transaction, by itself, substantially affects interstate commerce. In short, the Alabama Supreme Court rejected, albeit *sub silentio*, *Wickard*'s aggregation principle, a fact noted in dissents in *Sisters of the Visitation*, 775 So.2d at 779 (Hooper, C.J., dissenting), and in *Alafabco*, 2002 Ala. Lexis at *30 (See, J., dissenting). This Court expressly commands use of the aggregation principle in *Wickard*; indeed, in *Wickard* this Court plainly stated "[t]hat appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from scope of

federal regulation, where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard*, 317 U.S. at 127-28.

C. *Allied-Bruce Terminix* Mandates that Pest Control Arbitration Agreements be Enforced.

This Court's decision in *Allied-Bruce Terminix Cos., Inc. v. Dobson*, *supra*, succinctly summarized the scope of Congressional power under the Commerce Clause and established controlling principles regarding arbitration which the Alabama Supreme Court has ignored in *Alafabco* and its progeny. In *Allied-Bruce Terminix*, this Court held that the basic purpose of the FAA is to overcome court's refusals to enforce arbitration agreements and that the FAA's reach is expansive and coincides with that of the Commerce Clause. *Id.* at 270, 274-75. *Allied-Bruce Terminix* involved a pest control company which had an arbitration agreement in its contract. This Court reversed the Alabama Supreme Court's decision denying arbitration, finding that the case involved interstate commerce because of the multi-state nature of the defendants and because the termiticide and house repair materials used by defendants came from out of state. *Allied-Bruce Terminix*, 513 U.S. at 282. In reliance upon this Court's decision in *Allied-Bruce Terminix*, Alabama pest control operators began employing arbitration agreements in their customer

contracts. Contrary to the view of the Alabama Supreme Court, these arbitration agreements are due to be enforced under this Court's precedents.

D. *Alafabco* and its Progeny Continue the Alabama Supreme Court's Intransigence.

Sisters of the Visitation's progeny have extended and expanded the original error, and have jeopardized the rights of Alabama's pest control operators who acted in reliance upon *Allied-Bruce Terminix*. In *Alafabco*, No. 1010703, 2002 Ala. Lexis 249 (Ala. Aug. 30, 2002), the Alabama Supreme Court parsed a series of individual transactions between the parties so as to exclude indicia that Citizens Bank routinely conducts business outside the State of Alabama, that Alafabco owns and uses materials manufactured outside Alabama, and that Alafabco operates its business with funds borrowed from the Bank from consideration of the applicability of the FAA to the transactions in question. *Alafabco*, 2002 Ala. Lexis at *14.

The true absurdity of the *Sisters of the Visitation* and *Alafabco* holdings was demonstrated when the Alabama Supreme Court released its most recent decision in this line of cases in *Bowen v. Security Pest Control, Inc.*, No. 1010783, 2003 Ala. Lexis 64 (Ala. Feb. 28, 2003)(reproduced at App. 1a-28a). In *Bowen*, the Alabama Supreme Court extrapolated *Sisters of the*

Visitation and *Alafabco* to reach a result that was squarely at odds with this Court's decision in *Allied-Bruce Terminix, supra.*

In *Bowen*, the plaintiffs entered into a termite control contract with Security Pest Control (SPC) which contained an arbitration agreement. The plaintiffs subsequently sued in state court, alleging breach of contract and tort claims. SPC's motion to compel arbitration was granted by the trial court. The Alabama Supreme Court, relying on the *Sisters of the Visitation* factors, could not support arbitration unless the records demonstrated that the tools and equipment used by the pest control company were purchased or leased specifically for the project. It further held that in order to show a nexus with interstate commerce, SPC had to prove that it purchased the termiticide specifically for use on the Plaintiffs' house. *Bowen*, 2003 Ala. Lexis at *8-9.

Thus, *Bowen* refused to consider the aggregate effect of Alabama pest control industry's purchases of termiticide, tools, and equipment from out of state, a position squarely at odds with *Wickard*, *Lopez*, and *Allied-Bruce Terminix*. The *Bowen* opinion failed to reconcile its holding with the aggregation principle of *Wickard* and *Lopez*, despite a strongly-worded dissent raising *Wickard's* aggregation principle. *Bowen*, 2003 Ala. Lexis at *15-18 (See, J. dissenting). *Bowen* offered a weak distinction from the clearly

contradictory decision this Court issued in *Allied-Bruce Terminix*, stating, "However, unlike this case, 'the parties [in *Allied-Bruce Terminix*] did not contest that the transaction in [that] case ... involved interstate commerce.' " *Bowen*, 2003 Ala. Lexis at *10, n.3.

This attempt to distinguish *Bowen* from *Allied-Bruce Terminix* is disingenuous. First, this Court's decision in *Allied-Bruce Terminix* did not rest on the fact that neither party disputed that the transaction in that case affected interstate commerce; rather, the dispute hinged on the parties' subjective contemplation of whether the contract would affect interstate commerce. *Allied-Bruce Terminix*, 513 U.S. at 278. Second, the parties in *Bowen* did not contest that the case involved interstate commerce (plaintiffs did not contest SPC's affidavit that it purchased equipment and supplies from out of state); rather, the parties contested the extent of the contract's effect upon interstate commerce. Third, the *Bowen* opinion itself acknowledges that the pest control company's termiticide was purchased outside the State of Alabama. *Bowen*, 2003 Ala. Lexis at *8-9. This same factor was a major reason for this Court's finding that the pest control contract in *Allied-Bruce Terminix* affected interstate commerce. *Allied-Bruce Terminix*, 513 U.S. at 282. Plainly put, the Alabama Supreme Court's attempts in *Bowen* to distinguish the facts of that case from those of *Allied-Bruce Terminix* are more pretextual than substantive.

The holding in *Bowen* that SPC must demonstrate that the tools, equipment and termiticide used in treating the plaintiffs' house were purchased or leased specifically for that contract. *Bowen*, 2003 Ala. Lexis at *6-9, in order to prove a substantial effect on interstate commerce sufficient to trigger the FAA is defiantly contrary to this Court's longstanding aggregation principle in economic cases. It is not possible to reconcile *Bowen* with this Court's line of cases applying the *Wickard* aggregation principle.

The effect of this new line of Alabama cases on the Alabama pest control industry will be to eliminate the possibility of arbitrating disputes arising out of pest control contracts. Very few, if any, pest control operators purchase equipment or supplies for each individual contract.

II. This Court should exercise its discretion to correct a misinterpretation by the Alabama Supreme Court of federal law, which is in conflict with every other state and federal circuit that has addressed the issue.

Finally, amicus curiae Alabama Pest Control Association urges this Court to grant certiorari because the issue discussed in Issue I is the subject of a split among the states and circuits. The Alabama Supreme Court's holding regarding the aggregation principle in Commerce Clause economic cases is in conflict with the virtually every other court which has addressed the question.

More particularly, the *Sisters of the Visitation* holding is in conflict with the following decisions in other states and circuits, all of which employ the aggregation principle, either expressly or impliedly, in determining the reach of the Commerce Clause in intrastate commercial contracts. See, e.g., *Frier v. Westinghouse Electric Corp.*, 303 F.3d 176, 200-01 (2d Cir. 2002); *Gibbs v. Babbitt*, 214 F.3d 483, 493 (4th Cir. 2000); *G.D.F. Realty Investments, Inc. v. Norton*, 2003 U.S. App. Lexis 5818, *15-16 (5th Cir. 2003); *Dailey v. Veneman*, 2002 U.S. App. Lexis 24623, *12-13 (6th Cir. 2002); *Brown v. Investors Mortgage Co.*, 121 F.3d 472, 476 (9th Cir. 1997); *Durr v. Booker*, 1997 U.S. App. Lexis 435, *4 (10th Cir. 1997); *National Association of Homebuilders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. App. 1997); *University of South Alabama Foundation v. Walley*, 2001 U.S. Dist. Lexis 2975, *13-14 (S.D. Ala. 2001); *Freedom Baptist Church of Delaware County v. Township of Middleton*, 204 F.Supp.2d 587 (E.D.Pa. 2002); *Haeberlin Farms, Inc. v. I.G.F. Insurance Co.*, 641 N.W.2d 816 (Iowa 2002); and *United Property Owners Association v. Borough of Belmar*, 777 A.2d 950 (N.J. Sup. 2001).

All other jurisdictions follow this Court's requirement, as they must, that in determining whether the Commerce Clause controls in economic cases, the aggregation principle is used to determine whether the activity has a substantial effect upon interstate commerce. This Court should exercise its

discretion to bring Alabama into conformity with the above-cited authorities and with the decisions in *Wickard* and *Lopez*.

CONCLUSION

This Court should grant Citizens Bank's petition for certiorari to reaffirm its decisions in *Wickard*, *Allied-Bruce Terminix*, and *Lopez* regarding the primacy of the FAA in cases involving aggregated effects on interstate commerce, and also to resolve the conflict between the Alabama Supreme Court and other jurisdictions (including this Court) which have examined this issue.

The petition for writ of certiorari of Citizens Bank should be granted.

Respectfully submitted,

ALGERT S. AGRICOLA, JR.
G.R. TRAWICK *
JASON J. BAIRD
SLATEN & O'CONNOR, P.C.
Winter Loeb Building
105 Tallapoosa St., Suite 101
Montgomery, AL 36104
(334) 396-8882 (P)
(334) 396-8880 (F)

April 4, 2003

Counsel of Record

APPENDIX A

Michael Bowen and Britta Bowen v. Security Pest Control, Inc.

1010783

SUPREME COURT OF ALABAMA

2003 Ala. LEXIS 64

February 28, 2003, Released

PRIOR HISTORY:
Appeal from Tallapoosa Circuit Court. (CV-01-093).

DISPOSITION:
REVERSED AND REMANDED.

JUDGES:
BROWN, Justice. Houston, Lyons, Johnstone, Harwood, and Woodall, JJ., concur. Moore, C.J., concurs in the result. See, J., dissents.

OPINION BY:
BROWN

OPINION:
BROWN, Justice.

The plaintiffs, Michael Bowen and Britta Bowen, appeal from an order of the Tallapoosa Circuit Court compelling them to arbitrate their claims against defendant Security Pest Control, Inc. ("SPC"). We reverse and remand.

In April 1999, Michael Bowen entered into a termite control agreement ("the contract") with SPC pursuant to which SPC agreed to treat the Bowens' house for termites. The contract indicated that the cost of the treatment was $ 1,490, and it contained the following arbitration provision:

"In the event of a dispute between [SPC] and/or its employees and Customer with respect to interpretation of the terms and conditions of this agreement, including the making of this agreement, or breach of any provision of this agreement, the parties hereby expressly agree to submit their dispute to binding arbitration for resolution in accordance with the rules and requirements of the American Arbitration Association. The parties acknowledge and understand that by agreeing to submit their dispute to binding arbitration they are effectively waiving their right to trial by jury as a means of resolving disputes. Furthermore, the parties acknowledge that they desire to arbitrate any dispute arising from this agreement in an effort to resolve such dispute(s) quickly and avoid the costs of litigation. The parties further agree that any arbitration proceedings shall take place in Alexander City, Alabama."

SPC treated the Bowens' house with a termiticide called "Navigator TC." The treatment process included boring holes under the Bowens' house with special drilling equipment.

In June 2000, the Bowens discovered that termites had damaged their house. Specifically, they allege that termites had destroyed approximately 33 1/3% of the entire structure of their house, and that it will cost $ 50,000 to repair the damage. In May 2001, the Bowens brought this action against SPC, asserting numerous claims, including breach of contract, negligence, and fraud. In August 2001, SPC moved the trial court to compel arbitration. The trial court granted SPC's motion, and the Bowens appeal.

Standard of Review

Our standard of review of an order compelling arbitration is well settled:

"This Court's review of an order granting a motion to compel arbitration is de novo. See *W.D. Williams, Inc. v. Ivey, 777 So. 2d 94 (Ala. 2000); Patrick Home Ctr., Inc. v. Karr, 730 So. 2d 1171 (Ala. 1999).* Therefore, this Court must determine 'whether the trial judge erred on a factual or legal issue to the substantial prejudice of the party seeking review.' *Ex parte Roberson, 749 So. 2d 441, 446 (Ala. 1999).*"

BankAmerica Hous. Servs. v. Lee, 833 So. 2d 609, 617 (Ala. 2002). Furthermore:

"A motion to compel arbitration is analogous to a motion for a summary judgment. *TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999).* The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract evidences a transaction affecting interstate commerce. Id. 'After a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.' *Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n.1 (Ala. 1995)* (opinion on application for rehearing)."

Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000).

Discussion

Federal law demands the enforcement of written arbitration agreements that "'substantially affect[] interstate commerce.'" *Ballard Servs., Inc. v. Conner, 807 So. 2d 519, 521 (Ala. 2001)* (quoting *Sisters of the Visitation v. Cochran Plastering Co., 775 So. 2d 759, 767 (Ala. 2000)*); see also the Federal Arbitration Act, *9 U.S.C. § 1* et seq. ("the FAA"). Moreover, the burden of proving that a transaction substantially affects

interstate commerce is on the party attempting to compel arbitration. *Jim Burke Auto., Inc. v. McGrue, 826 So. 2d 122, 129 (Ala. 2002).* If that party fails to make such a showing, "the burden of proof does not shift to the opposing party and the motion should be denied." *Ex parte Greenstreet, Inc., 806 So. 2d 1203, 1207 (Ala. 2001).*

In Sisters of the Visitation, this Court set out five factors to be used in determining whether a transaction substantially affected interstate commerce. Those factors include: "(1) citizenship of the parties; (2) where the tools and equipment originated; (3) allocation of costs of services and materials; (4) subsequent movement across state lines; and (5) degree of separability from other contracts." Aronov Realty Brokerage, Inc. v. Morris, [Ms. 1001292, April 26, 2002] ___ So. 2d ___, ___, *2002 Ala. LEXIS 129 (Ala. 2002)* (citing Sisters of the Visitation). Applying those five factors to the particular facts of this case, we conclude that SPC did not demonstrate that this transaction had a substantial impact on interstate commerce.

1. Citizenship of the Parties

It is undisputed that the Bowens are both citizens of Alabama. Moreover, SPC is an Alabama corporation with its principal place of business in Alexander City, Alabama.

2. Origination of the Tools and Equipment

In an affidavit supporting the motion to compel arbitration, Mike Booker, the owner of SPC, claims that some of the tools and equipment used to treat the Bowens' house were purchased from out-of-state companies. Specifically, Booker states that the drilling equipment used to bore into the earth below the Bowens' house was purchased from Jim Simmons Company, located in Nashville, Tennessee. Attached to the affidavit are invoices from Jim Simmons Company for the purchase of a drill bit, purchased in January 1999 for approximately $ 150; a rotary hammer, purchased in February 1999 for approximately $ 500; and an adapter, purchased in March 1999 for approximately $ 126. Also, Booker indicates that the company truck used during the treatment of the Bowens' house was purchased in Roswell, Georgia, in April 1996.

The second factor--origination of the tools and equipment--"cannot support arbitrability unless the record demonstrates the extent to which tools and equipment moving interstate were 'leased or purchased specially for the project.'" Brookfield Constr. Co. v. Van Wezel, [Ms. 1010353, June 28, 2002] ___ So. 2d ___, ___, *2002 Ala. LEXIS 204 (Ala. 2002)* (quoting *Sisters of the Visitation, 775 So. 2d at 766).* It is apparent that the truck used during the treatment of the Bowens' house was purchased three years before the Bowens entered into the contract with SPC; thus, it was most likely not purchased specially for

treating the Bowens' house. Furthermore, it is unclear whether the drilling equipment, which was purchased before the execution of the contract with the Bowens, was purchased with that contract in mind. Because the record is silent as to the extent the truck and the drilling equipment were purchased specifically for the performance of this contract, i.e., for treating the Bowens' house, "no substantial effect on interstate commerce can be developed based on [SPC's] acquiring in interstate commerce any tools and equipment to be used in the performance of this contract." *Sisters of the Visitation, 775 So. 2d at 766.* See also Brookfield Constr. Co., ___ So. 2d at ___, 2002 Ala. LEIXS 204 at *4 (holding that the defendant failed to show the extent to which a construction project affected interstate commerce because, in part, the record "failed to show the extent to which tools and equipment moving interstate were 'leased or purchased specially for the project'" (quoting *Sisters of the Visitation, 775 So. 2d at 766)*); Aronov Realty Brokerage, Inc., supra (same).

3. Allocation of Costs of Services and Materials

SPC claims that the termiticide used to treat the Bowens' house was purchased from an out-of-state company and traveled in interstate commerce. Specifically, Booker's affidavit indicates that the Navigator TC used to treat the Bowens' house was manufactured in Brookfield, Connecticut. Booker also claims that SPC orders the chemical through VoPak, a national distributor of the product. The termiticide is

shipped from Connecticut to Atlanta, Georgia, where VoPak's southeastern regional office is located. It is then shipped to Birmingham before it is ultimately delivered to SPC in Alexander City.

Instead of addressing whether the specific Navigator TC used to treat the Bowens' house was purchased in this manner, Booker's affidavit gives only the general procedure SPC uses for purchasing the termiticide. It does not indicate whether the Navigator TC used in treating the Bowens' house was purchased specifically for that project, or whether it was instead purchased at a previous time for use in all contracts. n1

n1 The Bowens, in their brief to this Court, argue that the Navigator TC "came-to-rest" in Birmingham before it was purchased by SPC from VoPak. See *Ex parte Kampis, 826 So. 2d 819, 822 (Ala. 2002)* (explaining that, under the come-to-rest doctrine, when a product, which has moved in interstate commerce, reaches stores in Alabama, its flow in interstate commerce has ceased). SPC, on the other hand, argues that the Navigator TC stopped in Birmingham merely for "distribution" purposes. The record does not clearly indicate which is the case.

Because "the record provides no information from which we can determine what portion of the amount [the Bowens] paid [SPC] is allocable to the cost of local labor and overhead and what portion is allocable to materials or services specifically purchased for use or consumption in performance of the contract," SPC has not presented "sufficient evidence to justify the conclusion that [the Bowens'] contract substantially affects interstate commerce by reason of dependence upon materials and services moving in interstate commerce." *Sisters of the Visitation, 775 So. 2d at 766.* See also Brookfield Constr. Co., supra; Aronov Realty Brokerage, supra.

4. Subsequent Movement Across State Lines

As was the case in Sisters of the Visitation, the object of the services provided by the contract in this case, i.e., the Bowens' house, is incapable of movement across state lines. *775 So. 2d at 766.* Moreover, there is no allegation that the treatment of the structure with termiticide is capable of movement across state lines. Therefore, this factor is inapplicable in this case. n2

n2 In their discussion of this factor, SPC claims that because Navigator TC is regulated under the Federal Insecticide, Fungicide, and Rodenticide Act, *7 U.S.C. § 136* et seq., the use of this chemical triggers application of the FAA.

However, the fact that the chemical used in treating the house is regulated by the federal government does not demonstrate how the transaction is subject to subsequent movement across state lines. Moreover, as we explained in Alafabco, Inc. v. Citizens Bank, [Ms. 1010703, August 30, 2002] ___ So. 2d ___, ___, *2002 Ala. LEXIS 249 (Ala. 2002)*: "Holding that a transaction is subject to the FAA simply by virtue of ... Congressional regulation of some aspect of one party's business[] would effectively transform every 'local' transaction into a 'national' one."

5. Degree of Separability From Other Contracts

This Court has stated that this factor "cannot support arbitrability, unless the record demonstrates the extent of the subject transaction's 'impact on other contracts that do substantially affect interstate commerce.'" Brookfield Constr. Co., ___ So. 2d at ___, *2002 Ala. LEXIS 204* at *4 (quoting *Sisters of the Visitation, 775 So. 2d at 767;* emphasis added in Brookfield Constr. Co.). As SPC notes, this factor has no impact in this case; thus, we need not address it.

Conclusion

We hold that the record in this case does not demonstrate that the transaction at issue substantially

affected interstate commerce under the test set forth in Sisters of the Visitation. n3 Therefore, we reverse the trial court's order compelling arbitration and remand the case for proceedings consistent with this opinion.

n3 We note that *Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995),* is distinguishable from the instant case. In Allied-Bruce, the United States Supreme Court held that claims by homeowners against a termite-control service provider were enforceable under the FAA if the transaction to which the contracts related involved interstate commerce, regardless of the contemplation of the parties. *Id. at 281.* However, unlike this case, "the parties [in Allied-Bruce] did not contest that the transaction in [that] case ... involved interstate commerce." *513 U.S. at 282.*

REVERSED AND REMANDED.

Houston, Lyons, Johnstone, Harwood, and Woodall, JJ., concur.

Moore, C.J., concurs in the result.

See, J., dissents.

DISSENT BY:
SEE

DISSENT:

SEE, Justice (dissenting).

The main opinion states that under the five-part test adopted in *Sisters of the Visitation v. Cochran Plastering Co., 775 So. 2d 759 (Ala. 2000)*, "we conclude that Security Pest Control, Inc. ("SPC") did not demonstrate that this transaction had a substantial impact on interstate commerce." I respectfully dissent.

Standard of Review

This Court reviews de novo a trial court's grant or denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Hawkins, [Ms. 1010898, February 7, 2003] ___ So. 2d ___, *2003 Ala. LEXIS 30 (Ala. 2003); Tefco Fin. Co. v. Green, 793 So. 2d 755 (Ala. 2001);* see also Rule 4(d), Ala. R. App. P. This Court has held that "'to prevail on an assertion of arbitrability, the moving party is required to produce some evidence which tends to establish its claim,'" *Jim Burke Auto., Inc. v. Beavers, 674 So. 2d 1260, 1265 (Ala. 1995)* (opinion on rehearing) (quoting *In re American Freight Sys., Inc., 164 B.R. 341, 345 (D. Kan. 1994)*), and "'has the burden of proving the existence of a contract calling for arbitration and proving that that contract involves a transaction affecting interstate commerce,'" *Tefco Fin. Co. v. Green, 793 So. 2d at 758*(quoting *Ex parte Caver, 742 So. 2d 168, 172 n.4 (Ala. 1999)*)(emphasis added).

Commerce Clause Jurisprudence

In 1824, in *Gibbons v. Ogden, 22 U.S.(9 Wheat.) 1, 6 L. Ed. 23 (1824)*, the Supreme Court of the United States addressed the scope of the Commerce Clause. The New York Legislature had granted Ogden a monopoly "right to navigate waters" between Elizabethtown, New Jersey, and New York, New York. Id. Gibbons had infringed that right by operating two ships on the Elizabethtown-New York route, and the New York court had enjoined Gibbons's operation. The Supreme Court of the United States reversed, finding that navigation was commerce and that Congress's power over commerce preempted New York's licensing scheme. Chief Justice Marshall, writing for the Court, stated:

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. ...

"....

"The subject to which the power is next applied, is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior."

22 U.S. (9 Wheat.) at 189-94. Chief Justice Marshall continued:

"It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. ...

"... The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

22 U.S. (9 Wheat.) at 194-95.

Nonetheless, it was not until 1887 that the passage of the Interstate Commerce Act, *15 U.S.C. § 1,* "ushered in a new era of federal regulation under the commerce power." *United States v. Lopez, 514 U.S. 549, 554, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995).* Then, in 1937, in response to the New Deal legislation, the Supreme Court of the United States upheld the National Labor Relations Act and the National Labor Relations Board's decision to end the practice of discharging employees for union activity. *NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L. Ed. 893,*

57 S. Ct. 615 (1937). n4 The Supreme Court held that intrastate activities could "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions ...." *Id. at 37.*

n4 In NLRB v. Jones & Laughlin Steel Corp., the National Labor Relations Act was challenged in its entirety as an attempt to regulate not only commerce but all industry; however, the Court addressed only the actions that burdened or obstructed commerce.

Four years later, the Supreme Court upheld the Fair Labor Standards Act, which regulated the hours and wages of employees engaged in local manufacturing and prohibited the shipment of goods produced by manufacturers that were paying their employees less than the prescribed minimum wage or that were requiring more than the prescribed maximum number of hours of work. *United States v. Darby, 312 U.S. 100, 85 L. Ed. 609, 61 S. Ct. 451 (1941).* In Darby, the Court reaffirmed the notion that substantial intrastate activities could affect interstate commerce. Subsequently, the Supreme Court stated that "activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond

Congress' reach." *Lopez, 514 U.S. at 555*, citing *A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546, 79 L. Ed. 1570, 55 S. Ct. 837 (1935)*(emphasis added).

In 1942, in *Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*, the Supreme Court of the United States held that, under the Commerce Clause, Congress had the power to limit the production of wheat by a farmer who had sowed 23 acres of wheat for consumption on his own farm. n5 The Supreme Court instructed, first, that in weighing the effect of an activity on interstate commerce, courts are to consider the aggregate effect of that type of activity on interstate commerce. *317 U.S. at 124-28;* see also *Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); Tefco Fin. Co., 793 So. 2d at 759.* Furthermore, the Wickard Court expressly rejected the earlier "direct-/indirect-effects" analysis of interstate commerce; thus, the Court stated:

"Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" n6

n5 Filburn had challenged the constitutionality of the Agricultural Adjustment Act, which established a wheat-acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat per acre. *Wickard, 317 U.S. at 114.*

n6 In *Sisters of the Visitation v. Cochran, 775 So. 2d 759, 764 (Ala. 2000)*, the case on which the majority relies for its decision, a majority of this Court, interpreting Wickard, stated:

"We conclude that the question whether the actions of an individual, which actions standing alone would be considered 'local' actions or actions with only an 'indirect' influence on interstate commerce, may be considered to have a substantial influence on interstate commerce is to be determined by considering how critical the regulation of all similarly situated persons' activity is to the accomplishment of the primary purpose of a statute drawn to regulate an activity clearly having a substantial effect on interstate commerce."

Thus, in Sisters of the Visitation this Court purported to modify the United States Supreme Court's Wickard decision to exclude local or indirect effects unless those effects are sufficiently "critical" to the primary purpose of the statute. In the language recited from Wickard, the United States Supreme Court

> expressly rejected this kind of direct-indirect analysis; it was rejected for good reason because of the infinite malleability of the concept of directness. *Wickard, 317 U.S. at 125.*

317 U.S. at 125. The Wickard Court noted that the fact that Filburn's contribution to the demand for wheat "may be trivial by itself is not enough to remove him from the scope of federal regulation, where ... his contribution, taken together with that of many others similarly situated, is far from trivial." *Id. at 127-28.*

For over 50 years, following Wickard and up until *Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624,* the Supreme Court did not overturn a congressional act on the basis that the act violated the Commerce Clause. Then, in Lopez, the Supreme Court found that the relationship between the Gun-Free School Zones Act and interstate commerce was too attenuated to find a substantial effect on commerce. n7 Lopez was convicted of possession of a firearm in a school zone in violation of the Gun-Free School Zones Act. Reviewing several Commerce Clause cases, the Court identified three categories of activity Congress may regulate under its commerce power:

> n7 Justice Kennedy, concurring specially, and joined by Justice O'Connor, said that the Gun-Free School Zones Act "upsets the federal

> balance to a degree that renders it an unconstitutional assertion of the commerce power ...." *Lopez, 514 U.S. at 580* (Kennedy, J., concurring specially).

"First, Congress may regulate the use of the channels of interstate commerce. ... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. ... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, ... i.e., those activities that substantially affect interstate commerce."

514 U.S. at 558-59.

The government had argued in Lopez that crime in and around schools has a substantial effect on interstate commerce because "the costs of violent crime are substantial" and "violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe." *Id. at 563-64.* The Supreme Court, however, refused to accept the government's argument because, it reasoned, the Gun-Free School Zones Act had "nothing to do with 'commerce.'" n8 *Id. at 561.* Lopez did not overrule Wickard, but instead restricted the application of the Commerce Clause power to matters of commerce. n9

n8 The Court noted that if the Gun-Free School Zones Act passed constitutional muster, "it is difficult to perceive any limitation on federal power ...." *514 U.S. at 564.*

n9 In United States v. Ballinger, the United States Court of Appeals for the Eleventh Circuit discussed the Lopez restriction on the application of the Commerce Clause, stating:

"The talismanic repetition over the years of the phrase 'fullest extent' of congressional commerce power has led some to confuse this concept of the outer limits of congressional authority for an independent grant of authority. ...

"Perhaps this confusion springs from a failure to distinguish between regulation of economic as opposed to non-economic activity. When the regulated intrastate activity is a commercial or economic one, the Constitution permits the required substantial effect on interstate commerce to be located in the aggregate impact of the regulated activity upon interstate commerce. *Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942).* ... The Constitution permits such aggregation of effects to justify congressional regulation of purely intrastate economic activity when the absence of such regulation would undercut a larger

regulatory scheme affecting interstate commerce. *Lopez, 514 U.S. at 561, 115 S. Ct. 1624.*

"No such aggregation of local effects is constitutionally permissible in reviewing congressional regulation of intrastate, non-economic activity. *United States v. Morrison, 529 U.S. 598, 617, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000)* [striking down the Violence Against Women Act as an unconstitutional federal regulation of intrastate, non-economic, criminal behavior].... No aggregation of local effects is permissible to elevate a non-economic activity's insubstantial effect on interstate commerce into a substantial one in order to support federal jurisdiction. [*Lopez, supra*]."

United States v. Ballinger, 312 F.3d 1264 (11th Cir. 2002).

The Federal Arbitration Act

The Supreme Court of the United States held in *Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 76 L. Ed. 282, 52 S. Ct. 166 (1932),* that the Federal Arbitration Act ("the FAA") is a constitutional exercise of Congress's power. The FAA provides:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy

thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2. "The [FAA] preempts contrary state law (specifically, contrary law based on *Ala. Code 1975, § 8-1-41(3),*[n10] and public policy) and renders enforceable a written predispute arbitration agreement but only if that agreement appears in a contract evidencing a transaction that 'involves' interstate commerce." *Southern United Fire Ins. Co. v. Knight, 736 So. 2d 582, 585-86 (Ala. 1999);* see *Tefco Fin. Co. v. Green, supra.*

n10 *Alabama Code 1975, § 8-1-41(3),* makes void any agreement to arbitrate future, as opposed to present, disputes.

The Supreme Court of the United States has broadly interpreted the term "involving commerce" as being the "functional equivalent" of the phrase "affecting commerce." *Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995).* Congress's use of the phrase "affecting commerce" "normally signals Congress' intent to exercise its Commerce Clause powers to the full ...." *Id. at 273.*

In *Sisters of the Visitation v. Cochran Plastering Co., 775 So. 2d 759 (Ala. 2000),* the Sisters of the Visitation contracted with an in-state contractor to renovate a chapel located in Alabama and owned by the Sisters. Pursuant to an arbitration provision in the contract, the Sisters sought arbitration of their dispute with the contractor. In my dissent in that case, I noted that the majority held that the FAA can apply to a contract only if that "individual transaction 'substantially affects' interstate commerce." *775 So. 2d at 782.*

From the time of our decision in Sisters of the Visitation in March 2000, this Court has routinely denied a party the right to arbitration where that party failed to prove that the individual transaction substantially affected interstate commerce. See McConnell Auto. Corp. v. Jackson, [Ms. 1010006, November 1, 2002] ___ So. 2d ___, *2002 Ala. LEXIS 319 (Ala. 2002)* (denying arbitration in an action brought by a cash purchaser of a used car); Brookfield Constr. Co. v. Van Wezel [Ms. 1010353, June 28, 2002] ___ So. 2d ___, *2002 Ala. LEXIS 204 (Ala. 2002)* (denying arbitration in an action brought by homeowners against a construction company); Alafabco, Inc. v. Citizens Bank, [Ms. 1010703, August 30, 2002] ___ So. 2d ___, *2002 Ala. LEXIS 249 (Ala. 2002)* (denying arbitration in an action by a builder against the bank that provided financing for the builder's projects); Aronov Realty Brokerage, Inc. v. Morris, [Ms. 1001292, April 26, 2002] ___ So. 2d ___, *2002 Ala. LEXIS 129 (Ala. 2002)* (denying arbitration in an action brought

by a purchaser of a condominium unit against a real estate brokerage, real estate agent, and condominium association); *Liberty Nat'l Life Ins. Co. v. Douglas, 826 So. 2d 806 (Ala. 2002)* (refusing to compel arbitration where an employee of an insurance company sued her employer); *Ex parte Kampis, 826 So. 2d 819 (Ala. 2002)* (denying arbitration in an action brought by a home purchaser against a contractor); *Alternative Fin. Solutions, LLC v. Colburn, 821 So. 2d 981 (Ala. 2001)* (denying arbitration where borrowers brought an action against lenders challenging the legality of certain loans); *Ex parte Learakos, 826 So. 2d 782 (Ala. 2001)*(denying arbitration in an action brought by a home purchaser against a real estate company and its agents).

The Supreme Court of the United States stated in Lopez that in order for a federal statute that regulates commercial transactions to be a valid exercise of Congress's Commerce Clause power, the aggregate nationwide participation in that activity -- not the individual transaction in isolation -- must "substantially affect" interstate commerce. *Lopez, 514 U.S. 549 at 556, 131 L. Ed. 2d 626, 115 S. Ct. 1624.* This "substantial-effect" test -- used to determine the constitutionality of a statute under the Commerce Clause -- was not a new standard created in Lopez, but has been the test of a statute's constitutionality since the early twentieth century. *Id. at 555-57.*

Once it has been determined that Congress acted within its Commerce Clause power in enacting a

statute, whether that statute reaches certain activities does not depend on whether that individual act, when considered separately from all similar acts, has a substantial effect on commerce. As Wickard made clear, Filburn's "trivial" wheat production could be reached by the Agricultural Adjustment Act. The standard established by the Supreme Court of the United States is that "'where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" *Lopez, 514 U.S. at 558* (quoting *Maryland v. Wirtz, 392 U.S. 183, 197 n.27, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)).*

The standard for the application of the FAA to an individual contract was made clear in *Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 267, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995).* The FAA provides in pertinent part that "[a] written provision in ... a contract evidencing a transaction involving commerce ... shall be valid ...." *9 U.S.C. § 2* (emphasis added). The Supreme Court of the United States held in Allied-Bruce Terminix that the requirement in the FAA that an individual contract involve interstate commerce should be read in the broadest possible terms because the word "involving" signals "an intent to exercise Congress' commerce power to the full." *513 U.S. at 277.* The Court also stated that to be subject to the FAA a contract did not have to evidence a transaction that was "'substantially' interstate." *Id. at 269.*

Thus, I believe this Court erred when it held in Sisters of the Visitation that a particular contract, in order to be enforceable under the FAA must, by itself, have a substantial effect on interstate commerce, and this Court errs again today by applying the Sisters of the Visitation standard to this case.

The Supreme Court's analysis in Allied Bruce-Terminix recognized the substantial impact that the pest-control industry has upon interstate commerce. The contract at issue in that case, much like the contract between SPC and the Bowens in this case, was between an Alabama homeowner and an Alabama office of a pest-control company, and it involved an agreement to initially treat the house and then to re-treat it for as long as the contract remained in place. In contrast to the present case, the parties in Allied-Bruce Terminix "did not contest that the transaction in [that] case, in fact, involved interstate commerce." *Allied Bruce-Terminix, 513 U.S. at 282.* However, the grounds upon which the Supreme Court found that the contract did involve interstate commerce were that "in addition to the multistate nature of Terminix and Allied-Bruce, the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the [Termite-Protection] Plan, came from outside Alabama." *513 U.S. at 282.*

In *Southern Energy Homes, Inc. v. McCray, 788 So. 2d 882, 883 (Ala. 2000),* this Court also recognized that

using materials acquired outside Alabama to complete a project in Alabama can provide a link to interstate commerce sufficient to invoke the FAA. This Court held in that case that the purchase of a home manufactured in Alabama involved interstate commerce where the home was constructed from parts acquired outside Alabama.

In this case, Booker, the owner of SPC, stated in his affidavit that the "Navigator TC" termiticide used on the Bowens' house was manufactured in Connecticut and that SPC ordered it from a business in Atlanta, Georgia. Booker also stated in his affidavit that SPC purchased the company truck used in treating the Bowens' house in Georgia and the tools used to bore under the house to deliver the termiticide from Tennessee. Additionally, Booker stated that SPC maintains licenses to perform pest-control services in Georgia. Therefore, although it is undisputed that the contract for the pre-treatment of the Bowens' home and the continued pest-control treatment of the home is activity that occurred within Alabama, SPC and Booker have presented the requisite "'some evidence which tends to establish [their] claim,'" *Jim Burke Auto., Inc. v. Beavers, 674 So. 2d at 1265* (opinion on rehearing) (quoting *In re American Freight Sys., Inc., 164 B.R. at 345),* that the pest-control contract between SPC and the Bowens, considered in the aggregate, substantially affects interstate commerce.

SPC has shown that the contract provides for binding arbitration and that Michael Bowen signed

that contract. Although Britta Bowen did not sign the pest-control contract, the arbitration provision is nevertheless enforceable against her because she alleges a breach of that contract. *Ex parte Dyess, 709 So. 2d 447, 451 (Ala. 1997)* (a party who seeks the benefits of a contract is bound by all provisions of the contract, not just those he or she chooses to enforce).

The trial court correctly enforced the written arbitration agreement contained in the contract. I would affirm the trial court's order granting the motion to compel arbitration; therefore, I dissent.